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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RED WHALE, LLC, a California limited liability company, Plaintiff, v. BLUE WHALE COFFEE COMPANY LLC, a Nevada limited liability company; and DOES 1-10, inclusive, Defendants.	CASE NO.: **COMPLAINT FOR DAMAGES AND INJUNCTION** 1. Trademark Infringement 2. False Designation of Origin (JURY DEMAND)

Plaintiff Red Whale, LLC ("**Red Whale**"), for its complaint against defendants Blue Whale Coffee Company LLC ("**Defendant**") and Does 1 through 10, inclusive, (the "**Does**," and together with Defendant, "**Defendants**"), states and alleges as follows.

JURISDICTION, PARTIES, AND VENUE

Federal Subject Matter Jurisdiction

1. The Court has subject matter jurisdiction over this action under 15 U.S.C. §§ 1121 (trademark claims), 28 U.S.C. § 1331 (federal subject matter jurisdiction), and 28 U.S.C. § 1338(a) (trademark actions). This action includes claims for infringement of a trademark registered in the United States Patent and Trademark Office under section 32 the Lanham Act (as authorized by 15 U.S.C. § 1114) and for false designation of origin under section 43(a) of the Lanham Act (as authorized by 15 U.S.C. § 1125(a)).

Parties

2. Red Whale is a California limited liability company with its principal place of business in Mill Valley, California.

3. Red Whale is informed and believes, and based thereon alleges, that at all times relevant hereto Defendant has been a Nevada limited liability company with its principal place of business in Reno, Nevada within this District.

4. Red Whale is informed and believes, and based thereon alleges, that the Does are entities or individuals subject to the Court's jurisdiction. The true names and capacities, whether individual, corporate, associate, or otherwise, of the Does are unknown to Red Whale, which therefore sues the Does, and each of them, by such fictitious names, and Red Whale will seek leave of the Court to amend this Complaint to allege such true names and capacities when the same are ascertained.

5. Red Whale is informed and believes, and based thereon alleges, that each of the Defendants was the agent, employee, and/or alter-ego of each of the other remaining Defendants and, at all times relevant hereto, acted within the course and scope of such agency and/or employment.

Venue

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c).

GENERAL ALLEGATIONS

7. Since 2003, and in connection with its substantial commercial use of the RED WHALE mark (the "**Mark**"), Red Whale has continuously owned and operated Red Whale Coffee, which sells brewed coffee, coffee beans, apparel, drinkware and gift cards under the Mark. Through Red Whale's efforts, the Mark has become a recognized mark throughout the United States with tremendous goodwill, and the Mark is widely and favorably recognized and relied upon by consumers in the coffee industry as indicating high quality goods and services originating exclusively from Red Whale.

8. In 2012, Red Whale relocated from Canada to California, where it has continued to operate and grow its business.

9. As a result of Red Whale's extensive sales and advertising, the Mark is inherently distinctive or has developed secondary meaning, such that its primary significance is that it has become known by consumers in the coffee industry as a symbol for high quality goods and services that originate exclusively from Red Whale, including for the highest quality brewed coffee and roasted coffee beans with the best possible flavor, for a commitment to best practices in the coffee industry, and for high quality apparel and drinkware. Red Whale's customers recognize its commitment to a positive influence on the global community via its Chef Education and other community education projects using the "Red Whale" name and logo.

10. To protect the extensive goodwill symbolized by the Mark, Red Whale sought and obtained for its Mark a federal character mark registration on the Principal Register of the United States Patent and Trademark Office ("**USPTO**"), Registration No. 5,018,142, with a registration date of August 9, 2016, for use in connection with, among other things, coffee, coffee beans, roasted coffee beans, drinkware such as coffee cups, and apparel such as shirts, sweatshirts, and aprons (the "**Registration**"). Red Whale first

used the Mark in commerce no later than December 31, 2003. Red Whale also owns a related registration on the Principal Register of the USPTO, Registration No. 5,038,058, for a "Red Whale" design mark. A true and correct copy of the USPTO registration certificate for the Registration is attached as **Exhibit A**.

11. Red Whale also owns registered and common law rights in other trademarks aside from the Mark. For example, Red Whale sought and obtained a federal design mark registration on the USPTO's Principal Register, Registration No. 5038058, depicting a red whale for use in connection with, among other things, coffee, coffee beans, roasted coffee beans, drinkware such as coffee cups, and café services.

12. Red Whale is informed and believes, and based thereon alleges, that in July 2015 Defendant opened a coffee shop under and in connection with the BLUE WHALE mark, with full knowledge of Red Whale's prior and extensive use of the Mark and without authorization, license, or other permission by Red Whale to use the Mark or any mark confusingly similar thereto.

13. Red Whale is informed and believes, and based thereon alleges, that Red Whale's first use of the Mark in 2003 precedes Defendant's first use of the BLUE WHALE mark by at least twelve years.

14. Red Whale is informed and believes, and based thereon alleges, that Defendant is using the BLUE WHALE mark, a name, and a logo that are all confusingly similar to Red Whale's distinctive Mark for the purpose of promoting and selling brewed coffee and apparel – i.e., several of the exact same categories of goods marketed and distributed by Red Whale in connection with its Mark.

15. Since coffee beans are a natural expansion of the brewed coffee sales that Defendant already undertakes under the BLUE WHALE mark, Red Whale is informed and believes, and based thereon alleges, that Defendant intends to expand the goods it sells in connection with the BLUE WHALE mark to include coffee beans and roasted coffee beans in competition with Red Whale.

16. Despite multiple requests by Red Whale, Defendant has refused to cease all use of: (a) the BLUE WHALE mark, any colorable imitations thereof, and any mark that is confusingly similar to Red Whale's Mark; and (2) social media applications to promote the BLUE WHALE brand, including without limitation Defendant's Facebook page at https://www.facebook.com/bluewhalecoffeeco. Instead, Red Whale is informed and believes, and based thereon alleges, that Defendant continues to operate its coffee shop and sell brewed coffee under the BLUE WHALE mark that is confusingly similar to Red Whale's Mark.

FIRST CLAIM FOR RELIEF

Trademark Infringement Under The Lanham Act, 15 U.S.C. § 1114

17. Red Whale realleges and incorporates herein by this reference the allegations of paragraphs 1 through 16 above as though each was fully set forth below.

18. The Mark is a valid, protectable mark owned by Red Whale, and the primary significance of the Mark is that it is known by the relevant consuming public as a source indicator for Red Whale's products.

19. Defendant's unlicensed and unauthorized use of any colorable variation of the Mark, including without limitation the BLUE WHALE mark, in connection with selling brewed coffee and apparel has caused and/or is likely to cause mistake or confusion or deception in the minds of relevant consumers, such as coffee enthusiasts, concerning the source of goods or services marketed and distributed in connection with the Mark.

20. Because Red Whale has no control over the nature of Defendant's unlicensed and unauthorized use of the Mark and/or any mark confusingly similar thereto, Red Whale has been and is continuing to be damaged by Defendant's unlicensed and unauthorized use of the Mark and/or any mark confusingly similar thereto.

21. Red Whale is informed and believes, and based thereon alleges, that Defendant knew, or should have known, of Red Whale's rights in and to the Mark, and

that Defendant's adoption and continued use of the confusingly similar BLUE WHALE mark was knowing, willful, deliberate, and done with the intention of trading upon the goodwill built up by Red Whale in the Mark and Red Whale's business.

22. Defendant's use of the BLUE WHALE mark has caused, and unless restrained and enjoined by this Court will continue to cause, substantial, immediate, and irreparable injury to Red Whale's business, reputation, and goodwill for which Red Whale is without an adequate remedy at law. Red Whale is therefore entitled to injunctive relief as against Defendant in connection with Defendant's unlicensed and unauthorized use of the BLUE WHALE mark.

23. As a direct and proximate result of Defendant's adoption and continued use of the BLUE WHALE mark, Red Whale has suffered and continues to suffer injury, loss, and damages in an amount to be proven at trial. Based on Defendant's actions and omissions alleged herein, Red Whale is entitled to injunctive relief, monetary damages, and other remedies provided by Sections 1116, 1117, and 1118 of the Lanham Act, including without limitation Defendant's profits, treble damages, reasonable attorneys' fees, costs, and prejudgment interest.

SECOND CLAIM FOR RELIEF

False Designation of Origin Under The Lanham Act, 15 U.S.C. § 1125(a)

24. Red Whale realleges and incorporates herein by this reference the allegations of paragraphs 1 through 16 above as though each was fully set forth below.

25. Red Whale has no control over the nature and quality of the goods and services provided by Defendant. As a result of Defendant's unlicensed and unauthorized use of the BLUE WHALE mark which is confusingly similar to Red Whale's Mark, any failures, neglects, or faults by Defendant in providing its goods and services has reflected and will reflect adversely on Red Whale as the believed source and origin thereof, hampering efforts by Red Whale to continue to protect its reputation for quality goods

and resulting in a loss of sales thereof and its considerable expenditures to promote its goods under the Mark, all to the irreparable harm of Red Whale.

26. Defendant's use of the BLUE WHALE mark constitutes false designations of origin, false or misleading descriptions, and/or false or misleading representations.

27. Defendant's use of the BLUE WHALE mark is likely, within the meaning of 15 U.S.C. § 1125(a), to cause confusion, to cause mistake, or to deceive consumers into believing falsely that Defendant's business is affiliated, connected, and/or associated with Red Whale's business and/or that Red Whale has sponsored and/or approved of Defendant's goods or services or commercial activities undertaken in connection with the BLUE WHALE mark.

28. The actions and omissions by Defendant in connection with its use of the BLUE WHALE mark constitutes unfair competition vis-à-vis Red Whale and is an infringement of Red Whale's rights in its RED WHALE mark in violation of the Lanham Act, 15 U.S.C. § 1125(a).

29. Red Whale is informed and believes, and based thereon alleges, that at all relevant times Defendant knew, or should have known, of Red Whale's rights in and to the Mark and that the Mark is a source indicator of Red Well's products and services and thus, Defendant's false descriptions, false representations, and false designations of origin with respect to Defendant's use of the BLUE WHALE mark were knowing, willful, and deliberate and done with the intention of trading upon the goodwill built up by Red Whale in the Mark and Red Whale's business.

30. Defendant's use of the BLUE WHALE mark has caused, and unless restrained and enjoined by this Court will continue to cause, substantial, immediate, and irreparable injury to Red Whale's business, reputation, and goodwill for which Red Whale is without an adequate remedy at law. Red Whale is therefore entitled to injunctive relief as against Defendant in connection with Defendant's false descriptions, false representations, and false designations of origin related to Defendant's use of the

BLUE WHALE mark.

31. As a direct and proximate result of Defendant's adoption and continued use of the BLUE WHALE mark, Red Whale has suffered and continues to suffer injury, loss, and damages in an amount to be proven at trial. Based on Defendant's actions and omissions alleged herein, Red Whale is entitled to injunctive relief, monetary damages, and other remedies provided by Sections 1116, 1117, and 1118 of the Lanham Act, including without limitation Defendant's profits, treble damages, reasonable attorneys' fees, costs, and prejudgment interest.

PRAYER FOR RELIEF

WHEREFORE, Red Whale prays for entry of a judgment in its favor and against Defendants as follows:

1. For a permanent injunction restraining Defendants, their officers, managers, agents, servants, employees, representatives, attorneys, assigns, and all other persons in active concert or participation with them from:

(a) Using the BLUE WHALE mark, or any other trademark or service mark that is confusingly similar to the RED WHALE mark, as the whole or any part of a business name in connection with the sale of coffee, coffee beans, roasted coffee beans, or apparel;

(b) Using the BLUE WHALE mark, or any trademark or service mark that is confusingly similar to the RED WHALE mark, in connection with the advertising, sale, or promotion of coffee, coffee beans, roasted coffee beans, apparel, or any other products related thereto; and

(c) Holding out in any manner whatsoever that Defendants or Defendants' goods are in any way sponsored by, associated with, connected to, or affiliated with Red Whale or Red Whale's business.

2. That Defendants be directed to deliver to Red Whale for destruction all materials of any nature whatsoever bearing the BLUE WHALE mark, or any trademark

or service mark that is confusingly similar to the RED WHALE mark, pursuant to 15 U.S.C. § 1118;

3. That Defendants be required to make an accounting to Red Whale and be directed to pay over to Red Whale all gains, profits, and advantages realized by Defendants from Defendants' advertisement and/or sale of goods and/or services in connection with the BLUE WHALE mark or any other mark that is confusingly similar to the RED WHALE mark, pursuant to 15 U.S.C. § 1117;

4. That Defendants be directed to pay to Red Whale all damages suffered by Red Whale in connection with the allegations herein, pursuant to 15 U.S.C. § 1117;

5. That Defendants be directed to pay Red Whale's reasonable attorney's fees and all costs connected with this action, pursuant to 15 U.S.C. § 1117;

6. That Defendants be directed to pay to Red Whale prejudgment interest at the maximum rate permitted by law;

7. That Defendants be directed to pay to Red Whale punitive and exemplary damages in an amount to be determined at trial; and

For such other and further relief as the Court may deem just and proper.

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JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b) and LR 38-1, Red Whale demands a jury trial of all issues triable by a jury.

DATED this 4th day of May, 2017.

HOLLEY DRIGGS WALCH
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